IN THE

Supreme Court of the United States

October Term, 1978

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,

Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

JAY TOPKIS
345 Park Avenue
New York, New York 10022
(212) 644-8000

BERNARD KORMAN
One Lincoln Plaza
New York, New York 10023
(212) 595-3050

Attorneys for Petitioners
American Society of Composers, Authors and Publishers, et al.

Of Counsel:

SIMON H. RIFKIND
HERMAN FINKELSTEIN
ALLAN BLUMSTEIN
MAX GITTER
RICHARD H. REIMER
FRED D. HEATHER
PAUL, WEISS, RIFKIND, WHARTON & GARRISON
New York, New York

TABLE OF CONTENTS

Table of Authorities

CASES:

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Despite CBS' rather extended argument, this case is, we submit, quite simple:

CBS says it does not want an ASCAP blanket license; instead CBS says it wants a marketplace in which ASCAP's members, competing on a price basis, would license performance rights directly to CBS.

But the District Court found that CBS already has that marketplace: it could get all the licenses it needs directly from ASCAP's members, and the members would compete on a price basis, if asked.

Based on these and other extensive findings dealing with the structure and economics of both television and the music business, the trial court perceived no evil, no cognizable antitrust injury to CBS, and, hence, no violation of

the antitrust laws—not price-fixing, not tying, not boycotting and not monopolization.

The Court of Appeals did not disturb any of the findings of fact made by the District Court, nor did it take issue with any of Judge Lasker's legal conclusions, save for the one on price-fixing.

And so the central issue before this Court, as we articulated it in our petition for a writ of certiorari, is simply whether Section 1 of the Sherman Act condemns as "price-fixing" the offer of a package of products through a common sales agency, clearinghouse or joint venture, when any buyer may also obtain any one or more of those products by negotiating for them directly with the owner.

We shall discuss here in summary fashion a few of the errors we perceive in CBS' lengthy papers.

I.

CBS Is Not Entitled to a Trial *De Novo* in this Court

One constant error permeates CBS' brief—its unwillingness to recognize that findings of fact made by the District Court and left standing by the Court of Appeals (which means all of the District Court's findings) may not be re-litigated in this Court. *See, e.g., Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949) (this Court is not "a court for correction of errors in fact finding").

CBS' attempts to re-litigate the facts distort the legal issues before this Court. For example:

CBS now says that it agrees with the courts below that there is no "inherent" reason why CBS could not obtain all of the performance rights it needs via direct licenses from ASCAP's members (Brief for Respondent

at 35). But, argues CBS, there remain "artificial" and "cartel-created" barriers to achieving that result which can be removed only by judicial decree (Brief for Respondent at 121). Those barriers include what CBS describes as the lack of "transactional" machinery for direct licensing and "intense antagonism [by ASCAP members] to a competitive system" *e.g.*, Brief for Respondent at 79, 124.

The answer to the CBS position is that CBS sought to prove these assertions at trial—and failed. Thus, on the issue of "transactional" machinery, the District Court, after a painstaking review of the entire record, not just the snippets and excerpts contained in CBS' brief and addenda in this Court, concluded (Pet. App. 79a):

> "[T]he relevant question is whether the relatively modest machinery required [to enable CBS to engage in direct licensing] could be developed during a reasonable planning period. The evidence establishes beyond doubt that it could."

And after a similar review of the entire record dealing with the alleged "intense antagonism" of ASCAP's members to direct licensing, the District Court made this finding (Pet. App. 112a):

> "The music industry is highly fragmented. There are over 3,500 publishers and many thousands of composers who are eager for exposure of their music, and well aware that their compositions are, with rare exceptions, highly interchangeable with others. In such circumstances, for direct licensing to fail CBS would have to be met with extraordinarily coherent resistance by publishers and composers. There is no basis in the record for the inference that such a coherent response is likely to occur."

CBS' presentation is replete with numerous other examples of its efforts to obtain a trial *de novo* in this Court;

its 101 pages of addenda are only the most glaring example. When this material is excised from the CBS presentation, as it should be, we are left with the simple and readily determinable issues of law we have previously articulated.*

II.

ASCAP and Its Members Do Not Engage in Price-Fixing

The central fallacy in CBS' price-fixing argument is illustrated by a single sentence in its brief. According to CBS (Brief for Respondent at 54):

> "[ASCAP members] do so [fix prices] by agreeing to sell by committee, rather than by competing among themselves."

That statement is wrong as a matter of law. And it mischaracterizes the conduct of ASCAP's members.

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* In its discussion of the facts, CBS is not entirely fair: thus, CBS repeatedly writes as though the trial court "found" that, because of mechanical difficulties in negotiating direct licenses, CBS could begin direct licensing only after "a long period of advance preparation" (Brief for Respondent at 46, 129, 148-49). What Judge Lasker said was (Pet. App. 65a-66a):

> "[T]here is no support in the record for the proposition that CBS could even as a matter of internal business planning, switch over to direct licensing without a long period of advance preparation. Accordingly, to presuppose, as CBS does, that the feasibility of the direct licensing alternative is to be judged literally as of 'tomorrow' miscasts the issue. The proper question, we believe, is whether such mechanical obstacles as exist could be remedied within a reasonable period prior to cancellation of the blanket license."

As we have seen, Judge Lasker found that "a reasonable planning period" would solve the problem (Pet. App. 79a).

Then there is CBS' extraordinary statement that "defendants have explicitly conceded that the purpose of blanket licensing is to foreclose competition and inflate price . . ." (Brief for Respondent at 74). We made no such concession.

If CBS were correct as a matter of law, any common sales agency, including the CBS television network, would be illegal *per se*.

No case supports such a result. CBS has cited none.

To be sure, some joint selling ventures have been found to violate the antitrust laws. Thus, in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), two newspapers formed a joint venture to sell in combination the same products (subscriptions and advertising space), which they had previously sold separately—and with the joint venture established, they refused to deal separately. This Court quite understandably held, in affirming summary judgment, 394 U.S. at 134:

> "The purpose of the agreement was to end any business or commercial competition between the two papers . . . ."

But other joint ventures and like forms of economic integration have often been found to be lawful. *See, e.g., United States* v. *Columbia Pictures Corp.*, 189 F. Supp. 153, 166 (S.D.N.Y. 1960) ("the parties entered into the arrangement for legitimate purposes without intent to fix prices") and the other cases cited at p. 28 of our main brief.

The point, as we noted in our main brief, is simply that the rule of reason, not *per se* rules, provides the standard for determining the lawfulness of the conduct challenged by CBS in this lawsuit.

And, as we have shown, under the rule of reason, ASCAP and its members may not be adjudged to be in violation of the antitrust laws. ASCAP's members, from the date the Society was formed in 1914, have entered into their arrangements for legitimate business purposes—to make available to users via the blanket license a bundle of rights not otherwise obtainable from individual writers

or publishers, which most users desire, need and, indeed, in some instances have demanded.

Clearly, today under the aegis of the Amended Final Judgment, ASCAP does not fix prices for the blanket license nor does it tamper with prices for direct licenses. It offers a blanket license at a fee which it deems reasonable; powerful television networks, or industry-wide committees representing local radio or television stations, make counter offers. The parties—in point of law, combinations of buying entities on one side of the table and of sellers on the other—negotiate. If they are unable to agree, a District Court judge is standing by to fix a reasonable fee.

The ASCAP offer of a fee is no more an act of price-fixing than any counter offer by the network or industry-wide committees on the other side of the table.*

There is, we submit, no antitrust significance in the fact that since 1950 the District Court has never been called on to determine a reasonable fee after a full hearing on the merits. What that fact demonstrates is that the present system operates as a reasonable mechanism for adjusting the economic interests of copyright proprietors and users.**

Negotiations between ASCAP and the various segments of the broadcasting industry have been hard-fought dealings between sophisticated, well-financed, and well-advised parties. ASCAP has never sought nor been in a position simply to place a proposed agreement before any of these users and command their signatures. Contrary to the impression CBS and the broadcaster *amici* try to create, the forms of ASCAP licenses to broadcasters are not dictated by ASCAP—they are carefully negotiated documents.

* It was in this context that ASCAP's former General Counsel, Herman Finkelstein, testified at trial in response to theoretical questions from CBS concerning the television networks' enormous bargaining power vis-a-vis individual copyright owners. (13A, pp. 3678-3686). Mr. Finkelstein did *not* testify at trial that ASCAP fulfills a "market-functioning necessity" as suggested by CBS in its brief at pp. 97-98.

** Congress adopted a similar procedure for determining reasonable fees to be paid by public broadcasters. It established a Copyright Royalty Tribunal, 17 U.S.C. §§ 118, 801(b) (1978).

In these circumstances, the blanket license cannot be placed in that category of naked restraints so pernicious and lacking "redeeming virtue" that they are to be held *per se* illegal, *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 5 (1958).

CBS argues that the right and willingness of ASCAP's members to deal directly is legally irrelevant because, in every price-fixing agreement, a party may withdraw and deal on an individual basis. It is true that price-fixers may welsh on their agreements, and it is true also that the agreement is the essence of the wrong. But there is, we submit, no similarity between (1) price-fixers who welsh on their agreements and (2) a group of copyright proprietors who when requested offer a useful and needed bundle of rights at a negotiated (or judicially determined) price, but who stand ready to deal individually with any customer who does not want to buy the bundle.

CBS complains of what it terms the "impact of an all-industry committee reference point price on competitive price equilibrium levels" (Brief for Respondent at 62). The CBS point seems to be that the blanket license should be outlawed because, in direct dealings with CBS, ASCAP's members would take into account the royalty distributions they have received under an ASCAP blanket license. CBS may be right—but if it is, we perceive no evil. After all, the payments that ASCAP receives from its licensees are based on arm's-length negotiations, and presumably that says something about the value of ASCAP licenses to the users. And the distributions that an ASCAP member receives from ASCAP are based principally on performances of his works—which says something about the value of his music to users. We see no reason why an ASCAP member might not appropriately take

these facts into account, with others, in determining what prices should be offered to a prospective licensee.

In any event, it is not productive for courts—and surely not for this Court—to hypothesize as to how prices might be set in a direct licensing market, once it has been established, *as the District Court found*, that there would be price competition in that market (Pet. App. 82a-93a, 115a, 119a-120a). And surely, such hypothesizing should not be the rationale for condemning the blanket license as price-fixing.

We need not dwell on CBS' legal authorities. The impact on price perceived by the courts in *Socony-Vacuum* and *Plymouth Dealers'* was clear, but these cases on their facts have no relevance here.

CBS ignores *Arizona* v. *Cook Paint & Varnish Co.*, 391 F. Supp. 962 (D. Ariz. 1975), *aff'd on decision below*, 541 F.2d 226 (1976), *cert. denied*, 430 U.S. 915 (1977). That decision was (a) at odds with CBS' view of the proper scope of *Socony-Vacuum*, and (b) more consistent with this Court's view of the proper role of the *per se* doctrine than is CBS'. There, plaintiffs attempted to challenge under the antitrust laws defendants' cooperative advertising campaign. The advertising contained misrepresentations, said plaintiffs, and the necessary consequence of those falsehoods was to raise prices—which plaintiffs, relying on *Socony-Vacuum*, asked the trial court to hold illegal *per se*. The trial court (Renfrew, J.) refused, saying that price-fixing is only that conduct "whose actual purpose is to affect or regulate prices," 391 F. Supp. at 967. The Ninth Circuit affirmed on the opinion below.

The long-ago cases cited by CBS dealing specifically with ASCAP's activities, *e.g.*, *Watson* v. *Buck*, 313 U.S. 387 (1941) and *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948), are of mere historical interest today. *Watson* held only that a Florida statute aimed at price-fixing *might* constitutionally be applied to ASCAP—

but two years later, in *Palm Tavern, Inc.* v. *ASCAP*, 15 So. 2d 191 (1943), the Supreme Court of Florida held that ASCAP did not violate the statute, saying at 194:

> "The price-fixing, if it be called such, as is reflected by the contract here under consideration, is not such as to be in restraint of trade, because there is no monopoly. It is specifically provided that the user of the material which is licensed by the Society may contract directly with the owner of the copyright or may otherwise acquire the right to use the material as such contracting party may see fit."

Alden-Rochelle involved ASCAP's relations with motion picture exhibitors over thirty years ago—prior to the 1950 Amended Final Judgment. As the Court of Appeals for the Second Circuit pointed out in *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP*, 331 F.2d 117, 121 (2d Cir.), *cert. denied*, 377 U.S. 997 (1964):

> "The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by *Alden-Rochelle, Inc.* v. *ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948) and *M. Witmark & Sons* v. *Jensen*, 80 F. Supp. 843 (D. Minn. 1948)."

In recognition of the changes thus wrought, the trial court vacated the injunctive order which it had entered in *Alden-Rochelle*.

III.

The CBS Per-Use License Is without "Redeeming Virtue"

CBS now concedes that the relief it seeks in this lawsuit, a per-use license, has all of the vices of *per se* illegality that CBS attributes to the blanket license (Brief for Respondent at 171). But, says CBS, the per-use license should be decreed as a form of relief because it is "less restrictive" than the blanket license and may be utilized as an interim step to a direct licensing market.

However, analysis of the manner in which CBS would have the per-use license operate reveals the ultimate appeal of that license to CBS—and its ultimate vice under the antitrust laws.

Thus, under a per-use license CBS would obtain the same blanket access to the ASCAP repertory it obtains under a blanket license, but it would pay only a specified price for the use of each composition, the price to be determined by ASCAP, by negotiation, or by the court. Armed with such a license, CBS says it would then approach copyright proprietors and directly license the compositions it desired to use.

It takes but a moment to realize that such direct licensing transactions would necessarily be at prices below the per-use rates set in the per-use license: CBS surely would not pay more for a composition in a direct licensing transaction than the price available under the ASCAP per-use license. Inevitably the per-use rate would be only a ceiling which CBS could use to drive down prices in direct dealing.

The per-use system which CBS envisages has still further attraction for CBS, since CBS contemplates that the ASCAP per-use rates would be adjusted periodically by the court to "reflect competitive market price equilibrium levels," (Brief for Respondent at 173)—*i.e.*, the

prices CBS had been able to extract in direct transactions below the previously-existing ASCAP per-use rates.

Thus CBS seeks an ASCAP per-use license which not only would establish ceiling prices, but would regularly be adjusted to lower the ceilings.

In short, the CBS per-use system is not a "less restrictive" form of price-fixing than the blanket license. Rather, it is a vehicle for price stabilization and reduction on the buyer's side of the market utterly without "redeeming virtue."

IV.

ASCAP Is Not Guilty of Tying; ASCAP Does Not Monopolize

Since it was the Second Circuit's judgment that ASCAP was not guilty of tying and that it was not an unlawful monopoly, and since CBS did not file a cross-petition for a writ of certiorari, it is not at all clear that CBS may now urge that those alleged violations require affirmance of the Second Circuit's judgment with regard to the offense of price-fixing.* In any event CBS' arguments are without merit.

A. *Tying.*

The Second Circuit held here (Pet. App. 11a):

> "[T]his finding of the District Court that there is indeed a viable alternative to the blanket license disposes of the charge that the blanket license involves an illegal tie-in or block-booking, *see, e.g., United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 159, 68 S. Ct. 915 92 L. Ed. 1260 (1948); 17 U. Chi. L. Rev. 183 (1949); Timberg, *supra* note 6 at 300...."

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* *See* R. Stern & E. Gressman, *Supreme Court Practice* 477-87 (5th ed. 1978), and cases cited therein.

To the same effect: *Northern Pacific Railway* v. *United States*, 356 U.S. 1, 6 n.4 (1958).

CBS now argues that this conclusion was erroneous because of the so-called "barriers" to direct licensing that CBS claims to exist.

But, as we have already shown, the findings of the Courts below preclude CBS from re-litigating in this Court any factual issue with regard to the existence of such "barriers."

B. *Monopolization*

The District Court found (Pet. App. 119a-120a):

> "[T]he relevant market includes *all* sellers of performance licenses for network use, including ASCAP and BMI, as sellers of blanket licenses, and individual copyright proprietors, as sellers of 'direct' licenses.
>
> • • •
>
> "CBS has not established that ASCAP and BMI have power to control the prices in the market for performance licenses. We have found that copyright proprietors would deal readily on a price basis; certainly the record does not establish that ASCAP and BMI could effectively control the prices at which such transactions take place.
>
> • • •
>
> "Finally, there is no substantial evidence that ASCAP and BMI have attempted to monopolize the market for performance rights for network use. Although at present they are the sole suppliers of CBS' music needs, such a state of affairs has resulted not from any violation of the antitrust laws but because CBS has, since the advent of television, found it convenient to secure a blanket license which, by definition, can be practicably obtained only through a collective licensing agent" (emphasis in original).

The Second Circuit held (Pet. App. 23a, n.29):

> "As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP blanket license. The District Court, as noted, rejected this contention and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record."

The Courts below were right. Unlike unlawful monopolies, ASCAP has no power to, and does not, boycott or exclude either members or compositions. *Compare, e.g., Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); *Associated Press* v. *United States*, 326 U.S. 1 (1945). ASCAP has no power to control the supply of any product and thereby exact a price. *Compare, United States* v. *Aluminum Co. of America*, 148 F.2d 416, 426 (2d Cir. 1945). And ASCAP has no power to discriminate, either in price or in any other fashion, among users similarly situated. *Compare, e.g., United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 340-41 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

No organization is a "monopolist" when it (a) permits everyone who so wishes to enter it; (b) permits everyone who so wishes to leave; (c) has no power to refuse to deal; (d) has no power to set a price; (e) has no power to discriminate among users or members; and (f) has no power to prevent its members from dealing with users directly.

CBS' response is (Brief for Respondent at 153):

> "the barriers to a bypass *both* place the blanket license in a separate market from individual performance rights *and* confer monopoly power on each common-sales agency that purveys a blanket license" (emphasis in original).

Again, CBS would re-litigate the District Court's undisturbed findings of fact.

CONCLUSION

The decision appealed from should be reversed and the order of the District Court dismissing the complaint should be reinstated.

Respectfully submitted,

JAY TOPKIS
BERNARD KORMAN
Attorneys for Petitioners
American Society of Composers, Authors and Publishers, et al.

Of Counsel:

SIMON H. RIFKIND
HERMAN FINKELSTEIN
ALLAN BLUMSTEIN
MAX GITTER
RICHARD H. REIMER
FRED D. HEATHER
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

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